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In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals rendered an unnecessary judgment on the constitutionality of section 244(c)(2) of the Immigration and Nationality Act ("INA") by failing to remand to the Immigration and Naturalization Service ("INS") to determine the availability of statutory relief following the alien respondent's marriage to a United States citizen and the passage of the Refugee Act of 1980.

2. Whether a court of appeals has jurisdiction in a case brought under section 106(a) of the INA to resolve the constitutionality of section 244(c)(2).

3. Whether the inseverability of section 244 deprives the alien respondent of standing to challenge the constitutionality of the legislative review procedure in section 244(c)(2), by eliminating any statutory basis for the grant of relief by the court of appeals.

4. Whether section 244(c)(2), under which permanent residence is granted to deportable aliens only after legislative review, is a constitutional means of implementing the power of Congress over the admission of aliens.*

*The Senate relies on the brief of the House of Representatives for the argument of the additional questions presented in the petitions for certiorari.

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OPINIONS BELOW

The opinion of the court of appeals (J.S. 1a–63a) is reported at 634 F.2d 408. The decisions of the INS special inquiry officer (J.S. 64a–66a, 70a–71a) and the opinion of the Board of Immigration Appeals (J.S. 72a–73a) are not reported. The judgment of the court of appeals is reprinted in the Senate petition for certiorari at 84a.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1980. On March 25, 1981, the court of appeals denied the petition of the Senate and House for rehearing (J.S. 76a). The petitions of the Senate and House for certiorari were granted on October 5, 1981, and consolidated with No. 80–1832, the appeal of the Immigration and Naturalization Service ("INS"). The question of jurisdiction in No. 80–1832 was postponed.[1] This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of Articles I and II of the Constitution are set forth in the House petition at 27–28.

2. The pertinent portion of section 106(a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. 1105a(a), is set forth in the House petition at 29.

3. Sections 244(a), (c), and (d) of the INA, 8 U.S.C. 1254(a), (c), and (d), and other pertinent provisions of the INA, are set forth in the Senate petition at 85a–91a.

STATEMENT OF THE CASE

Jagdish Rai Chadha was born in Kenya and lived there until he entered the United States as a nonimmigrant student in September, 1966. In December, 1963, Kenya became independent from Great Britain. All persons born in Kenya prior to independence automatically became citizens, except for those whose parents had not been born there. Those persons were entitled until December, 1965, to register as citizens.[2] Chadha, who is "of Indian origin" (J.A. 38), did not become a Kenyan citizen and entered the United States on a British passport which stated that he was a "Citizen of the United Kingdom and Colonies" (J.A. 20). He obtained degrees from Bowling

[1] Rule 16.8 of this Court requires that the question of jurisdiction be addressed first. We rely on the argument of the House of Representatives on this point. *See* House brief at 15–18.

[2] Kenya Independence Order in Council, S. I. 1963/1968, sched. 2, c. 1, §§ 1, 2.

Green State University and overstayed his student visa when it expired in June, 1972.

On October 11, 1973, the INS ordered Chadha to show cause why he should not be deported pursuant to section 241(a)(2) of the INA, 8 U.S.C. 1251(a)(2), for having "remained in the United States for a longer time than permitted" (J.A. 6). At a hearing on January 11, 1974, held pursuant to section 242(b) of the INA, 8 U.S.C. 1252(b), his counsel admitted that Chadha was "deportable as charged" (J.A. 10), but expressed fear of racial persecution if Chadha were deported to either Great Britain or Kenya. The INS officer asked whether Chadha wished to apply for withholding of deportation under section 243(h) of the INA, 8 U.S.C. 1253(h), which then authorized, but did not require, the Attorney General to withhold the deportation of any alien who would be subject to persecution on account of race.[5] Chadha's counsel preferred to apply for suspension of deportation under section 244 of the INA, 8 U.S.C. 1254, because Chadha "has to have permanent residence . . . in order to get gainful employment" (J.A. 17–18).

Section 244(a)(1) and (2) establish the qualifications for relief under 244. Section 244(a)(1) establishes general eligibility requirements, while section 244(a)(2) establishes more stringent requirements for aliens who are deportable for criminal and other specified reasons. The general eligibility requirements in section 244(a)(1) are residence in the United States for seven years, good character, and a showing that deportation would result in "extreme hardship" to the alien or his citizen or permanent resident spouse, parent, or child.

Section 244(c)(1) provides that upon the application of an alien eligible under section 244(a), the Attorney General may suspend deportation and report the facts and reasons for suspension to the Congress. For aliens covered by section 244(a)(2), section 244(c)(3) provides that suspended deportations may be canceled only upon affirmative approval by a concurrent

[5] The INS officer told Chadha's counsel that "under outstanding instructions when a person applies for the withholding of his deportation, the matter must first be referred to the Department of State and you must justify it" (J.A. 19).

resolution of the Congress.[4] For aliens who are covered by section 244(a)(1), section 244(c)(2) requires cancellation of deportation if neither House passes a resolution of disapproval before the end of the session following the suspension. Section 244(d) grants permanent residence upon the cancellation of deportation.

Chadha stated, in applying for permanent residence under section 244, that he was "unable to return to either country of birth or nationality because of immigration laws and ethnic background" (J.A. 35).[5] In a "Statement of Hardships," his counsel asserted that deportation would disrupt Chadha's "personal ties" and "his complete cultural and societal integration with American norms of living." He also contended that "Chadha['s] hard-earned degrees would not be able to be professionally utilized or recognized relative to the varying standards of foreign educational/professional licensing systems" (J.A. 37).

The INS officer concluded: "I'm unable to find on the basis of the evidence submitted that Mr. Chadha would suffer the extreme hardship required by the statute. Accordingly, I am going to deny his application for suspension of deportation" (J.A. 30). He then adjourned the hearing, only to resume it to announce, without explanation, that "on further thought I think I might be inclined to grant this application for suspension of deportation" (J.A. 31). In a written decision on June 25, 1974, the special inquiry officer concluded: "The re-

[4] Concurrent resolutions of the Congress are agreed to by both Houses but are not presented to the President; in contrast, joint resolutions are presented to the President for approval.

[5] In support, he submitted letters from Kenyan and British consular officials (J.A. 43-45). Under the United Kingdom's Immigration Act, 1971, § 3, Chadha is required to obtain leave to enter the United Kingdom. The Act is implemented by Immigration Rules which require that he obtain a special entry voucher or a work permit for a specific job. Special entry vouchers are issued at the discretion of the British government: "An annual quota of special vouchers has been available since 1968, mainly in East Africa to heads of households and their families who were under pressure and had nowhere to go. The annual quota was set initially at 1,500; revised to 3,000 in mid-1971; to 3,500 in 1972 and to 5,000 in 1975." Gt. Britain, Home Office, *Control of Immigrants Statistics, United Kingdom, 1980*, 28 Cmnd. No. 8199 (1981).

spondent has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. . . . Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him" (J.S. 66a).*

The suspension was reported to Congress for consideration under section 244(c)(2). On December 16, 1975, the House agreed to House Resolution 926, 94th Cong., 1st Sess., "That the House of Representatives does not approve the granting of permanent residence in the United States to the [six] aliens hereinafter named . . .," including Chadha (J.S. 69a). The chairman of the Immigration Subcommittee stated: "It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship" (J.S. 68a).

The deportation proceeding was reopened on August 4, 1976. Chadha's counsel moved to terminate it on the ground that section 244(c)(2) is unconstitutional. The special inquiry officer declined to rule on the constitutionality of section 244 (c)(2), adding, "the whole suspension procedure is a package deal and if the Congressional review aspect is found unconstitutional it would follow that the whole section would become inoperative" (J.A. 50). After Chadha declined to designate a country of deportability, the INS officer "propose[d] to order that he be deported to the United Kingdom of which he is a citizen. If you think that he will be persecuted in that country you can either apply for asylum . . . or . . . the withholding of deportation under Section 243(h)" (J.A. 51). Chadha did not apply, and a final order of deportation to the United Kingdom was entered on November 8, 1976 (J.S. 70a–71a). The Board of Immigration Appeals dismissed his appeal on February 11, 1977 (J.S. 72a–73a).

* The INS officer noted that Chadha "stated that his deportation would result in a hardship to him because he has formed strong personal ties with friends and because it is questionable whether he would be able to utilize his education in other countries" (J.S. 66a), but he made no finding with respect to these assertions.

On March 24, 1977, Chadha petitioned the court of appeals to review the order of deportation. The INS informed the court that it agreed that section 244(c)(2) is unconstitutional and suggested that the Senate and House be invited to file briefs amicus curiae, which they did. On November 28, 1980, Chadha's counsel notified the court that Chadha had married a United States citizen on August 10, 1980. Even though Chadha was now eligible for permanent residence as the spouse of a citizen, his counsel asked the court to decide the constitutionality of section 244(c)(2). The Senate and the House asked for time to brief the effect of Chadha's marriage, but the court rendered its decision on December 22, 1980, without having heard from them or from the INS on Chadha's changed status.

The court held that it had jurisdiction under section 106(a) of the INA (J.S. 4a–11a), and that Chadha's claim was justiciable. First, it held that section 244(c)(2) is severable from the remainder of section 244 and that "if section 244(c)(2) is invalidated, the original suspension under section 244(a) will be reinstated and Chadha's status adjustment will become permanent" (J.S. 18a–19a). Second, it held that Chadha's claim was not a political question because "the source of [the] claimant's appeal is not textually committed to another branch" (J.S. 22a). Third, the court found sufficient adverseness for jurisdiction, noting the appearance of the Senate and House as amici at the court's invitation (J.S. 23a).

On the merits, the court held that section 244(c)(2) "violates the rule of separation of powers by usurping a necessary power of another branch" (J.S. 26a), and ordered that the deportation proceedings be canceled (Sen. Pet. 84a). Pursuant to S. Res. 40 and H.R. Res. 49, 97th Cong., 1st Sess. (1981), the Senate and House moved to intervene and petitioned for rehearing. The court granted the motions to intervene on March 10, 1981, and denied the petition for rehearing on March 25, 1981.

SUMMARY OF ARGUMENT

I

The history of section 244 demonstrates that Congress intended legislative review to be indispensable to the grant of

permanent residence to deportable aliens. Almost fifty years ago, the executive first requested legislation to authorize it to waive deportation laws on hardship grounds, but Congress viewed the grant to the executive of final discretionary authority as an abdication of its role in controlling immigration. Congress and the executive broke their deadlock in 1940 by adopting a cooperative procedure patterned after the resolution, the previous year, of a similar impasse over executive reorganization. The statutory compromise, which President Roosevelt approved without objection, authorized the executive to suspend deportation and to report to Congress, which could then disapprove the recommended grant of permanent residence by concurrent resolution. When President Kennedy signed into law the current version of section 244, he became the fourth president to approve legislation providing for congressional review of relief from deportation.

II

Fundamental principles of judicial restraint required the court of appeals to remand the case to the INS to consider the availability of statutory relief. While the case was under submission, Chadha became eligible for permanent residence when he married a United States citizen. Also, Congress enacted the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102, which prohibits the deportation of an alien to a country in which he would face persecution. Despite the availability of alternative statutory relief, the court unnecessarily adjudicated a constitutional question with grave implications for the allocation of power between the political branches.

III

The court of appeals lacked jurisdiction to adjudicate the constitutionality of section 244. Section 106(a) of the INA provides for review in the courts of appeals of final orders of deportation entered "pursuant to administrative proceedings under section 242(b) of this Act." The court of appeals extended section 106(a) to encompass a constitutional challenge to congressional action external to the administrative deporta-

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tion proceeding. However, this Court has ruled that the jurisdiction of the courts of appeals under section 106(a) is limited "to orders entered during proceedings conducted under § 242 (b), or directly challenging deportation orders themselves." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 215 (1968). The decision of the court of appeals is now in conflict with the Third Circuit, which has since held that "a faithful application of *Cheng Fan Kwok*" requires that constitutional challenges to statutes and regulations underlying deportation orders begin in the district courts. *Dastmalchi* v. *INS*, No. 80–2432, slip op. at 17 (3d Cir. Sept. 17, 1981).

IV

The basic rules of constitutional litigation require that the Court consider the statutory question of severability first. *McCorkle* v. *United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). The language and history of section 244 demonstrate that the Congress firmly conditioned its limited delegation of power to the executive upon retention by the Congress of the sole authority to cancel deportations and grant permanent residence. Section 244 specifically provides that cancellation of deportation and the grant of permanent residence to a deportable alien depend upon favorable congressional review. If section 244(c)(2) were invalidated, there would be no statutory authority to cancel Chadha's deportation or grant him permanent residence. This is confirmed by the legislative history of section 244, which is marked by the repeated rejection of requests by the executive for authority to cancel deportations. The invalidation of the procedure for congressional review would require the abrogation of the suspension procedure as a whole. Consequently, there is no judicial relief which may be granted to Chadha and he lacks standing.

V

Section 244 satisfies the separation of powers test of *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). It augments, and in no way infringes upon, executive power. Congres-

sional disapproval of the grant of permanent residence does not undermine the exercise of executive discretion to suspend deportation temporarily. Rather, it constitutes an exercise of the retained power of the Congress to cancel deportations and grant permanent residence. *Asimakopoulos* v. *INS*, 445 F.2d 1362, 1364–65 (9th Cir. 1971).

Nor does section 244 infringe on judicial power. Under the INA the courts do not review whether an alien should have been granted permanent residence, but only whether the Attorney General improperly denied the alien the opportunity to have Congress consider granting permanent residence. Congressional review of the executive's recommendation to cancel deportation in no way interferes with judicial review of the executive's refusal to suspend deportation and report to Congress.

Section 244 is justified by the need to promote the power of Congress over the admission of aliens. Congress has established in great detail categories to govern the treatment of aliens. It has also determined that there should be a procedure to suspend the mechanical operation of the deportation rules in unforeseeable circumstances. In cooperation with the executive the Congress has designed a flexible mechanism to allow the executive to initiate recommendations for relief and to preserve the final authority of the Congress to grant permanent residence. The arrangement has allowed the political branches to work harmoniously for forty years to grant permanent residence to thousands of deportable aliens.

ARGUMENT

I

THE HISTORY OF SECTION 244 DEMONSTRATES THAT CONGRESS INTENDED TO PRESERVE ITS AUTHORITY OVER THE GRANT OF PERMANENT RESIDENCE TO DEPORTABLE ALIENS

Section 244's legislative history spans the years from 1934 to 1962. During this time, the Congress repeatedly rejected the executive's request for authority to cancel deportations and insisted that legislative review be an indispensable requirement

for granting permanent residence to deportable aliens. As an accommodation between the branches, four successive presidents agreed without constitutional objection to arrangements which paralleled statutes for legislative review of executive reorgnizations, whose constitutionality the executive has repeatedly affirmed. Because the origins of section 244 are central to the entire case, we begin by setting forth the section's history in some detail.

1. THE ADMINISTRATION OF PRESIDENT ROOSEVELT

The Immigration Act of 1924, Pub. L. No. 139, § 14, 43 Stat. 153, 162, required the Secretary of Labor to deport any alien who entered or remained in the United States unlawfully. In 1933, Secretary Perkins temporarily suspended numerous deportations on grounds of hardship, 78 Cong. Rec. 11783 (1934), and requested that the 73d Congress adopt legislation to allow deportable aliens to remain in the United States. H.R. 9725, 73d Cong., 2d Sess. (1934). The Labor Department bill was opposed as "grant[ing] too much discretionary authority," 78 Cong. Rec. 11790 (remarks of Rep. Dirksen), and it failed decisively. *Id.*, 11791.

In the 74th Congress, the administration supported bills to authorize an Inter-Departmental Committee to grant permanent residence to deportable aliens who had lived in the United States for ten years or who had close relatives here. S. 2969 and H.R. 8163, 74th Cong., 1st Sess. (1935).[7] The bills were attacked as an "abandonment of congressional control over the deportation of undesirable aliens," H.R. Rep. No. 1110 (Part 2), 74th Cong., 1st Sess. 2 (1935), and after prolonged debate the Congress adjourned without taking action.[8]

[7] "While any police court judge or magistrate who has authority to sentence a criminal . . . may, in his uncontrolled discretion, prevent the deportation of that criminal . . . *there is no power in the United States, not even that of the President, to avert the deportation of an alien who is not a criminal.*" H.R. Rep. No. 1110, 74th Cong., 1st Sess. 6 (1935) (emphasis in original).

[8] The House requested the Secretary of Labor to extend deportation stays until March 1, 1936, to give the Congress time to consider legislation.

In the 75th Congress, Representative Dies introduced H.R. 6391 to authorize the Secretary to grant permanent residence to up to 8,000 deportable aliens. He described this as "a compromise of the deportation question, which has been pending in the House for many years." 81 Cong. Rec. 4652 (1937). The bill passed the House, *id.*, 5574, but did not come to a vote in the Senate. 83 Cong. Rec. 8992–96 (1938).

A legislative solution was not found until the 76th Congress and the executive agreed to procedures for congressional review. First, the House agreed to an amendment to H.R. 5138 to grant authority to the Department of Labor to suspend deportations which would cause serious economic detriment to the dependent citizen or legally resident wife, parent, or child of a deportable alien. Suspensions for longer than six months would be reported to Congress "with appropriate recommendations and the reasons for clemency." Permanent residence could be granted only "if by act or resolution the Congress shall direct the deportation warrant to be canceled. . . ." 84 Cong. Rec. 10455 (1939).

Secretary Perkins told the Senate that "it does not appear [the House bill] . . . will accomplish anything tangible," and renewed her support for the Dies bill which had failed in the 75th Congress.[9] In response, the Senate Judiciary Committee reported an amended bill. While the House bill had required congressional action to cancel specific deportations, the Senate amendment required that deportations should be canceled un-

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H.R. Res. 350, 74th Cong., 1st Sess. (1935). In response, Secretary Perkins acknowledged: "Temporary stays are legal beyond question. Stays . . . which are in effect permanent are, despite the humane arguments in their favor, illegal." H.R. Doc. No. 392, 74th Cong., 2d Sess. 6 (1936).

[9] The Secretary said of the House bill: "It really adds nothing to powers not already possessed by the Department or by the Congress. Congress has always had the right to relieve an alien of deportation by passing a private bill. The Department has always had authority to bring meritorious cases to the attention of the Congress, and it has always been the administrative practice, when a private bill is pending, not to effect deportation." *Crime to Promote Overthrow of Government: Hearing on H.R. 5138 Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 3d Sess. 29 (1940) (letter from Secretary Perkins to Senator Danaher).

less "the Congress shall by Act or resolution reject the recommendation of the Secretary. . . ." [10]

On May 22, 1940, the President invoked the legislative review mechanism of the Reorganization Act of 1939 to propose the transfer of the INS from the Department of Labor to the Department of Justice.[11] The 1939 Act, adopted with the President's approval after extensive discussion of its constitutionality, provided that executive reorganization proposals would become effective unless disapproved by concurrent resolution of the Congress.[12] Then, on June 10, 1940, the Senate committee reported, and the Senate shortly thereafter passed, a second substitute deportation bill whose procedures paralleled those of the 1939 Reorganization Act. Under this compromise between the House bill and the executive's original proposals, the Attorney General could suspend the deportation of qualified indi-

[10] H.R. 5138, § 10, as reported with amendments by S. Rep. No. 1721, 76th Cong., 3d Sess. 2 (1940).

[11] Congress approved the President's reorganization proposal and accelerated its effective date by a joint resolution on June 4, 1940. H.R.J. Res. 551, 54 Stat. 230.

[12] In March, 1939, the House Select Committee on Government Organization had reported H.R. 4425 to authorize the President to transmit reorganization plans, which would take effect in sixty days unless the Congress disapproved by concurrent resolution. The Committee stated:

"That the taking effect of action legislative in character may be made dependent upon conditions or contingencies is well recognized. The latest pronouncement of the Supreme Court on the subject is in *Currin et al.* v. *Wallace et al.*, . . . decided January 30, 1939. . . . *It seems difficult to believe that the effectiveness of action legislative in character may be conditioned upon a vote of farmers but may not be conditioned on a vote of the two legislative bodies of the Congress.*" H.R. Rep. No. 120, 76th Cong., 1st Sess. 6 (1939) (emphasis added).

The House passed the bill after closely considering its constitutionality. *E.g.*, 84 Cong. Rec. 2477–79 (1939). Senator Wheeler proposed that reorganization plans be approved by joint resolutions of the Congress. *Id.*, 2957. Senator Barkley responded that congressional review is "a condition precedent which, in my judgment, is just as valid as the affirmative condition which is urged here by the Wheeler amendment," *id.*, 3036, and Senator Wheeler's amendment was defeated. *Id.*, 3093. Although a year earlier, President Roosevelt had objected to congressional review of executive reorganization orders, 83 Cong. Rec. 4487 (1938), he approved the Reorganization Act of 1939, Pub. L. No. 19, 53 Stat. 561.

viduals and report to the Congress. The deportation would be canceled and permanent residence granted if Congress did not adopt a concurrent resolution of disapproval. S. Rep. No. 1796, 76th Cong., 3d Sess. 5–6 (1940). The executive played a major role in fashioning this compromise.[13]

Representative Celler told the House that the Senate compromise "makes the act humane and reasonable," 86 Cong. Rec. 9035 (1940), and the House agreed to the amended bill. Without objection, President Roosevelt approved the Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 670, becoming the first of four presidents to approve the use of congressional review to grant permanent residence to deportable aliens.

2. THE ADMINISTRATION OF PRESIDENT TRUMAN

In 1947, the Department of Justice requested legislation to authorize the Attorney General to cancel deportations without congressional review. H.R. 2933, 80th Cong., 1st Sess. (1947). The administration did not question the constitutionality of congressional review, but sought merely "to save time and energy of everyone concerned. . . ." [14] The Senate Judiciary Committee insisted, however, "that affirmative action by the Congress in all suspension cases should be required before deportation proceedings may be canceled.' [15] Congress rejected

[13] *See* Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 Pub. Ad. Rev. 281, 283 (1941) ("The Senate Judiciary Committee . . . substituted a Labor Department draft. . . ."). Speaking generally of the bill, which became the Alien Registration Act of 1940, Senator Connally informed the Senate: "We called on the Department of Justice, and had the Solicitor General with us. We called in the Commissioner of Immigration and Naturalization, and together we went over all the existing laws, and worked the new provisions into the existing laws, so as to make a harmonious whole." 86 Cong. Rec. 8345 (1940).

[14] *Regulating Powers of Attorney General to Suspend Deportation of Aliens: Hearings Before the Subcommittee on Immigration of the House Committee on the Judiciary on H.R. 245, H.R. 674, H.R. 1115, and H.R. 2933*, 80th Cong., 1st Sess. 34 (1947).

[15] S. Rep. No. 1204, 80th Cong., 2d Sess. 4 (1948). The House Judiciary Committee reported that it "gave careful consideration to H.R. 2933, which represented the views of the Department of Justice, but . . . decided that the best interests of the country would be served by limiting the proposed extended powers. . . ." H.R. Rep. No. 647, 80th Cong., 1st Sess. 2 (1947).

the Department's request for final authority and amended the Immigration Act to require that cancellation of deportation be approved by a concurrent resolution of the Congress; President Truman signed the bill without objection. Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206. The following year, when Congress renewed the Reorganization Act of 1939, the Justice Department defended the constitutionality of legislative review of executive reorganization plans, citing as support the legislative review mechanism for cancellation of deportations.[16]

Early in the following Congress, the House Judiciary Committee reconsidered the 1948 Act. Concluding that the requirement of affirmative approval was unworkable, the committee reported H.R. 3875 to require the Attorney General to cancel deportations if neither House disapproved his recommendations. H.R. Rep. No. 362, 81st Cong., 1st Sess. (1949). The House passed the bill, 95 Cong. Rec. 3822 (1949), but the Senate took no action. Instead, the Senate Judiciary Committee, in a comprehensive report preparatory to the Immigration and Nationality Act of 1952, recommended a compromise between the existing law and the House bill. For certain classes of aliens, the committee suggested that the adjustment of status be subject to disapproval of either House; [17] but deportation of an alien "who is of the criminal, subversive or immoral classes *or who overstays his period of admission,*" would be canceled only upon a concurrent resolution of approval. S. Rep. No. 1515, 81st Cong., 2d Sess. 610 (1950) (emphasis added). In the 82d Congress, the Senate and the House approved provisions for

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[16] *See* Department of Justice, *Memorandum re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress* (S. 526 and H.R. 2361, 81st Cong., 1st Sess.), *reprinted in* S. Rep. No. 232, 81st Cong., 1st Sess. 19–20 (1949).

[17] A year earlier, in its report on executive reorganization, the Senate Judiciary Committee explained why either House should be empowered to disapprove executive proposals: "The power thus reserved to each House seems essentially the same as that possessed by each House in the ordinary legislative process, in which process no new law or change in existing law can be made if either House does not favor it." S. Rep. No. 232, *supra* note 16, at 15.

congressional review generally consistent with the 1950 Senate committee report.[18]

Section 244 was enacted when the Congress overrode President Truman's veto. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 214 (1952). As part of a detailed veto message, the President specifically considered the provision for suspension of deportation and objected only to the restrictiveness of its eligibility standards, not to the provisions for legislative review.[19]

3. THE ADMINISTRATION OF PRESIDENT EISENHOWER

In 1956 and 1957, President Eisenhower expressed concern over the increasing number of private immigration bills and requested that the Attorney General be given final authority to grant discretionary relief for specified categories of aliens,

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[18] The Senate Judiciary Committee explained why it classified, for purposes of congressional review, aliens who overstay visas with aliens deportable for criminal reasons. The committee objected to the use of nonimmigrant visas by persons who intended subsequently to seek an adjustment of status. "This practice is grossly unfair to aliens who await their turn on the quota waiting lists. . . ." S. Rep. No. 1137, 82d Cong., 2d Sess. 25 (1952).

[19] The Deputy Attorney General and the Acting Commissioner of the INS had submitted their views on the legislation, and neither had objected to congressional review. *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong., 1st Sess. 280–88, 711–22 (1951). In vetoing the INA, President Truman objected that a requirement that cabinet officers transmit documents to a Joint Congressional Committee was "not consistent with the constitutional doctrine of the separation of powers," while he voiced no such objection to congressional review under section 244. H.R. Doc. No. 520, 82d Cong., 2d Sess. 7 (1952). Earlier, President Truman had signed the Displaced Persons Act of 1948, Pub. L. No. 774, § 4, 62 Stat. 1009, 1011, which authorized the Attorney General to recommend and the Congress by concurrent resolution to approve permanent residence for 15,000 displaced persons already residing in the United States. The President questioned "the cumbersome practice of special action by the Congress to adjust the status of individual aliens," Pub. Papers 384 (1948), but did not contend that legislative review was beyond the power of Congress. In contrast, President Truman explicitly objected to review by *committees* of the Congress, *e.g.*, 98 Cong. Rec. 9756 (1952) (veto of bill requiring House and Senate committee approval of postal facility leases).

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H.R. Doc. No. 329, 84th Cong., 2d Sess. 3–4 (1956); H.R. Doc. No. 85, 85th Cong., 1st Sess. 4 (1957).[20] There is no indication that President Eisenhower's proposal was motivated by constitutional doubt about section 244.[21] Congress agreed to grant discretion to the Attorney General to *admit* some excludable aliens on hardship grounds, Act of September 11, 1957, Pub. L. No. 85–316, § 5, 71 Stat. 639, 640, but again refused to delegate to the executive final authority to grant relief from deportation.[22]

4. THE ADMINISTRATION OF PRESIDENT KENNEDY

In 1962, President Kennedy, who was the fifth president to approve congressional review of reorganization proposals,[23] also

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[20] Bills to implement the President's proposals provided that the Attorney General be authorized "to withhold the institution of deportation proceedings, to cancel an order of deportation and to adjust the status" for aliens in three categories: veterans, relatives of citizens or permanent residents, and clergymen. S. 3167, § 2, 84th Cong., 2d Sess. (1956); S. 343, § 2, and S. 1006, § 8, 85th Cong., 1st Sess. (1957).

[21] In 1957, President Eisenhower requested extension of "the practical arrangements contained in the Reorganization Act by which the Congress and the President can carry forward their cooperative endeavors to provide the best possible management of the public business." Pub. Papers 232 (1957). He also approved the Refugee Relief Act of 1953, Pub. L. No. 203, § 6, 67 Stat. 400, 403, to grant permanent residence to Eastern European refugees by concurrent resolution. Like President Truman, President Eisenhower disputed the constitutionality of review by congressional *committees*, *e.g.*, 102 Cong. Rec. 12958 (1956) (veto of bill requiring committee approval of certain defense expenditures).

[22] *See* 103 Cong. Rec. 1509 (1957) (remarks of Rep. Walter). Section 13 of the 1957 Act, 8 U.S.C. 1255b, grants discretion to the Attorney General to record the permanent residence of no more than fifty diplomatic refugees annually. The statute requires the Attorney General to report to the Congress the reasons for the adjustment of status, which becomes final if neither House disapproves. President Eisenhower signed the act without objecting to this provision. Pub. Papers 672 (1957).

[23] President Hoover was the first president to endorse congressional review of executive reorganization. Pub. Papers 432 (1929). In 1961, President Kennedy credited the reorganization act as "a long accepted and useful procedure. . . ." Pub. Papers 251 (1961). Like his predecessors, he opposed committee review of executive actions, Pub. Papers 6 (1963), but he also proposed legislation to authorize either House to reject agricultural production and marketing plans. Pub. Papers 196 (1961).

became the fourth president to approve congressional review of the grant of permanent residence to deportable aliens when he signed legislation amending section 244.[24] The Senate passed S. 3361 to amend section 249 of the INA to authorize the Attorney General to record the permanent residence of aliens who had entered the United States before December, 1952, rather than before June, 1940, as the INA then provided. Representative Walter moved successfully in the House to eliminate this portion of the Senate bill, arguing "[i]f there are meritorious cases, then we feel we can deal with them adequately through existing suspension of deportation laws or through private legislation." 108 Cong. Rec. 22607 (1962). The conferees compromised by broadening eligibility under section 244, thereby facilitating residence for deportable aliens in Chadha's class,[25] while adhering to the legislative decision that "the granting of relief will be subject to congressional review . . . ." H.R. Rep. No. 2552, 87th Cong., 2d Sess. 4 (1962).

II

FUNDAMENTAL RULES OF JUDICIAL RESTRAINT REQUIRE A REMAND TO CONSIDER THE AVAILABILITY OF STATUTORY RELIEF

Section 244 is one of a number of statutes which use procedures for legislative review to accommodate the powers and responsibilities of the elected branches. These statutes span issues as diverse as the withdrawal of armed forces from overseas hostilities, the foreign sale of defense material, the deferral of federal spending, and the allocation of food aid among needy countries.[26] Considering the importance of legislative review in

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[24] Act of October 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247.

[25] Permanent residence for aliens who overstay their nonimmigrant visas, as Chadha did, no longer requires approval by a concurrent resolution; the 1962 amendment allows cancellation of deportation if neither House objects.

[26] War Powers Resolution, § 5, 50 U.S.C. 1544(c); International Security Assistance and Arms Export Control Act of 1976, § 211, 22 U.S.C. 2776(b); Congressional Budget and Impoundment Control Act of 1974, § 1013, 31 U.S.C. 1403; International Development and Food Assistance Act of 1975, § 310, 22 U.S.C. 2151n. *See* Addendum 1 to this brief, *infra*, for a list of current provisions for legislative review and disapproval.

these and other statutes, the court of appeals should not have decided the fundamental constitutional issue presented to it, for two reasons.

First, Chadha married a United States citizen on August 10, 1980. The Attorney General has final authority under section 245 of the INA to grant permanent residence to an alien spouse of a citizen, and, "[i]n the absence of adverse factors, adjustment will ordinarily be granted." [27] The court of appeals reached the merits after Chadha's counsel stated that Chadha had no "present intention" of seeking an adjustment of status,[28] but a party's desire to challenge the constitutionality of a statute does not control when a nonconstitutional resolution is available. *Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963).

Second, there has been a major change in the law. Chadha presented himself to the INS as a potentially stateless person who feared persecution if deported to the United Kingdom or Kenya. In March, 1980, prior to the decision of the court of appeals, the Congress enacted the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102. The Act authorizes the Attorney General to grant asylum, and then permanent residence, to any alien who is unable to return to his country of nationality because of "a well-founded fear of persecution on account of race," [29] and it prohibits the Attorney General from deporting an alien to a country in which his "life or freedom would be threatened . . . on account of race. . . ." [30] Thus, if Chadha's fear of racial persecution is well-founded, the Attorney Gen-

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[27] *Matter of Arai*, 13 I. & N. Dec. 494, 496 (1970), *quoted in Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). The INS officer told Chadha that "if you got married you would have no difficulty in having your status adjusted" (J.A. 29).

[28] Memorandum with Respect to Current Status of Petitioner Jagdish Rai Chadha filed November 28, 1980.

[29] Refugee Act, § 201, adding INA, §§ 101(a)(42), 208, 209(b), 8 U.S.C.A. 1101(a)(42), 1158, 1159(b) (Supp. 1981).

[30] Refugee Act, § 203(e), amending INA, § 243(h), 8 U.S.C.A. 1253(h)(1) (Supp. 1981). "The new § 243(h) removes the absolute discretion formerly vested with the Board." *McMullen* v. *INS*, 658 F.2d 1312, 1316 (9th Cir. 1981).

eral must withhold the deportation order on which the jurisdiction of the court of appeals rested.[21]

As a result, Chadha's claim "assume[s] a posture quite different from the one now presented," *Thorpe* v. *Housing Authority*, 386 U.S. 670, 673 (1967) (per curiam), and a remand to the INS is required to determine his present status. *See INS* v. *Stanisic*, 395 U.S. 62, 79 n.22 (1969). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1979), *quoting Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). Now that Congress has provided firm statutory protection for refugees, the INS should determine whether the Refugee Act, rather than constitutional litigation concerning section 244, may provide relief.[22]

The court of appeals treated Chadha's marriage as a mootness question, and did not state its views on the Refugee Act of 1980, which was presented to it in the petition for rehearing. The issue is not mootness. Even for cases "confessedly within its jurisdiction," the Court has enunciated "a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). It is this sound principle of judicial

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[21] From the inquiry officer's findings, the asylum and withholding of deportation provisions of the 1980 Refugee Act may not only offer Chadha a nonconstitutional remedy, but be the preferred avenue for relief. *Matter of Kojoory*, 12 I. & N. Dec. 215, 219–20 (1967) ("Where a respondent cannot establish the necessary hardship for suspension, we do not believe that a claim of persecution should be used to make up the deficit. The remedy available where the likelihood of persecution can be satisfactorily established is a stay of deportation under section 243(h)").

[22] Congress had already provided for Chadha's other problem, obtaining admission to the United Kingdom. Under section 243(a) of the INA, 8 U.S.C. 1253(a), the Attorney General may deport an alien only to a "country [which] is willing to accept him into its territory." If any country unduly delays acceptance of a national, the Secretary of State, upon notification by the Attorney General, shall "discontinue the issuance of immigrant visas to nationals . . . of such country, until such . . . country has accepted such alien." INA, § 243(g), 8 U.S.C. 1253(g).

restraint which required the court of appeals to avoid the adjudication of the major constitutional issue in this case. *See Clark* v. *Valeo*, 559 F.2d 642, 663 (D.C. Cir.) (en banc) (Leventhal, J., concurring) (distinguishing prudential concerns from mootness as ground to dismiss challenge to legislative review provision), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977).

The court justified its refusal to avoid the constitutional question on the ground that statutory relief would not act retroactively. In fact Chadha would receive a properly equivalent remedy if his status were adjusted as the spouse of a citizen or as a refugee. The jurisdiction of the court of appeals was invoked to review an order of deportation. Its judgment was limited to the validity of the deportation order (Sen. Pet. 84a). By reason of his marriage or through asylum Chadha can obtain relief identical to that judgment, cancellation of the deportation proceeding. In a footnote, but not in its judgment, the court asserted that permanent residence for Chadha, granted through this constitutional adjudication, should be dated retroactively to the temporary suspension of deportation in 1974 (J.S. 18a n.6). However, section 244 is explicit that cancellation follows congressional review, and that permanent residence dates from the cancellation of deportation.[33]

Since 1940, the political branches have cooperated through section 244 to grant permanent residence to thousands of deportable aliens.[34] Until this case, the executive had not ques-

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[33] The Congress specifically considered the date on which an alien should become a permanent resident if his deportation is canceled. The Alien Registration Act of 1940 provided that "[u]pon the cancelation of such proceedings . . . the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States. . . ." Pub. L. No. 670, § 20, 54 Stat. 670, 672. The provision for retroactive grant of permanent residence was eliminated in the INA, Pub. L. No. 414, § 244(d), 66 Stat. 216–17.

[34] Between 1940 and 1948, over 19,000 deportable aliens were adjusted to permanent residence under the forerunner to section 244. No disapproval mechanism existed between 1948 and 1952. Since 1953, more than 5,700 aliens have been granted permanent residence through section 244(c)(2). Over the last forty years, Congress has disapproved cancellation of deportation of 229 aliens. *See* Addendum 2 to this brief, *infra*, for a compilation of congressional actions under section 244.

tioned the provision's constitutionality. Before the Court is asked to resolve the grave constitutional question in this case, the respondents should pursue alternative relief which is available under the INA. If, in the future, Chadha or someone else lacks an alternative remedy, resolution of the constitutional question may be necessary. Until then, the fundamental rules of restraint which this Court honors preclude adjudication of the constitutional issue in this case.[35]

III

THE COURT OF APPEALS LACKED JURISDICTION UNDER SECTION 106(a)

Section 106(a) of the INA limits the jurisdiction of the courts of appeals to the review of final orders of deportation "pursuant to administrative proceedings under section 242(b) of the Act. . . ." Even though congressional review takes place outside of the administrative proceedings conducted under section 242(b), the court of appeals concluded that it had jurisdiction under 106(a). This important threshold ruling of the court of appeals has since been specifically rejected by the Third Circuit, which concluded that "unlike the court in *Chadha*, we cannot read section 106(a) to encompass attacks on the constitutionality of a statute or a regulation underlying an alien's deportation order." *Dastmalchi* v. *INS*, No. 80–2432, slip op. at 22 (3d Cir. Sept. 17, 1981). Chadha should have commenced his action in the district court.

"[A] jurisdictional statute of this kind should be circumspectly construed. . . ." *Foti* v. *INS*, 375 U.S. 217, 232 (1963) (Harlan, J., concurring). Section 106(a) grants to the courts of appeals the power to review discretionary determinations by INS officials with responsibility for the conduct of depor-

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[35] "[T]he constitutional validity of a congressional disapproval device 'represents the continuation of a dispute of major constitutional proportions which has been brewing for forty years.' No good reason appears why, in the circumstances of this case, this court should now strain to exercise its jurisdiction to resolve this momentous political as well as legal problem." *Clark* v. *Valeo*, *supra*, 559 F.2d at 649–50 (per curiam) (footnote omitted) (quoting Department of Justice memorandum).

tation proceedings.[36] The Court drew the line in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), ruling that the denial of a stay of deportation by an INS district director, who has no responsibility for section 242(b) deportation proceedings, was not covered by section 106(a). The Court held that "§ 106(a) embrace[s] only those determinations made during a proceeding conducted under § 242(b), including those determinations made incident to a motion to reopen such proceedings." *Id.* at 216.

The court of appeals extended this jurisdictional line to reach "all matters on which the validity of the final order [of deportation] is contingent, rather than only those determinations actually made at the hearing" (J.S. 5a). But this Court has already rejected the theory of the INS "that § 106(a) should be understood to embrace all determinations 'directly affecting the execution of the basic deportation order,' whether those determinations have been reached prior to, during, or subsequent to the deportation proceeding." *Cheng Fan Kwok* v. *INS*, *supra*, 392 U.S. at 210. As the Third Circuit recognized, a "faithful application of *Cheng Fan Kwok*" means that judicial review under section 106(a) does not extend to the constitutionality of section 244(c)(2), because that issue could not have been tested during the administrative deportation proceedings. *Dastmalchi* v. *INS*, *supra*, slip op. at 17.[37]

The Attorney General's grant of a temporary suspension ends his discretion under section 244 and delimits the court's jurisdiction under section 106(a). This demarcation is more than formal. It reflects the consistent judgment of the Congress over the forty-year history of section 244 that the role of the Attorney General is limited to determining which cases should be reported to Congress and to suspending those deportations temporarily to allow the Congress to consider his recommendations. It also reflects the nature of judicial review of a deportation proceeding, which, pursuant to section 106

[36] *Foti* v. *INS*, *supra* (review of denial by INS special inquiry officer of application for suspension during a section 242(b) deportation proceeding); *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam) (refusal by Board of Immigration Appeals to reopen a section 242(b) deportation proceeding).

[37] *See Rassano* v. *INS*, 377 F.2d 971, 974 (7th Cir. 1967) (alien may not collaterally attack prior conviction during deportation hearing).

(a)(4), "shall be determined solely upon the administrative record upon which the deportation order is based. . . ." The parties in an INS proceeding naturally develop a record geared to the determinations which are within the power of the INS to make. Not surprisingly, there is nothing in the administrative record in this case which sheds any light on the theoretical assessment of the court of appeals that congressional review disrupts the implementation of section 244. "Review of various legislative review mechanisms ought at an absolute minimum to be informed by experience and not depend solely on abstract analysis or speculation. A court should know a great deal more about what a unicameral disapproval device means in practice. . . ." *Clark* v. *Valeo, supra,* 559 F.2d at 650 n.10.

"[T]he basic purpose of § 106(a) was to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts. . . ." *Foti* v. *INS, supra,* 375 U.S. at 226. There is no danger that proceeding in the district court rather than the court of appeals will proliferate the opportunities for judicial review. The four-year proceeding in the court of appeals cannot be justified by the need to expedite immigration cases. This case does not involve review of repetitive determinations which may figure in many immigration cases. Rather, it is a singular controversy which may be litigated in the district court without affecting the jurisdiction of the courts of appeals over matters which arise with great frequency in section 242(b) deportation proceedings. *See Cheng Fan Kwok* v. *INS, supra,* 392 U.S. at 217 ("[O]n occasion, the review of denials of discretionary relief will be conducted separately from the review of an order of deportation involving the same alien. Nonetheless, this does not seem an onerous burden. . . .")[38]

[38] On those occasions when Congress intended there to be an initial ruling by the courts of appeals on the constitutionality of legislative review mechanisms, it has enacted special provisions by which challenges commence in the district courts and are certified to the courts of appeals to hear en banc. Federal Trade Commission Improvements Act of 1980, § 21(f), 15 U.S.C.A. § 57a-1(f) (Supp. 1981); Act of December 17, 1980, Pub. L. No. 96-539, § 4, 94 Stat. 3196 (extension of Federal Insecticide, Fungicide, and Rodenticide Act) (to be codified in 7 U.S.C. 136w).

IV

BECAUSE SECTION 244(C)(2) IS INSEVERABLE THERE IS NO RELIEF WHICH MAY BE PROVIDED

If the delegation of limited authority to the Attorney General is inseverable from the provision for legislative review, the court of appeals lacked statutory authority to order cancellation of Chadha's deportation. For this reason, "The canons of constitutional litigation dictate that we initially consider the statutory issue of separability before we turn to the question of constitutionality." *McCorkle* v. *United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). With respect to severability, the question pertains "to the *intent* of Congress, rather than to its *power*." *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938) (emphasis in original). The language and history of section 244 demonstrate that Congress intended legislative review to be indispensable to the grant of permanent residence to deportable aliens.

"[I]n any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself." *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). The court of appeals concluded that subsection 244(c)(2) was severable and that subsection 244(a) grants to the Attorney General complete and final power to adjust the status of deportable aliens (J.S. 15a–16a). However, subsection 244(a) does no more than to introduce the full section and to describe the categories of aliens who are eligible for relief. As its first words indicate, the limited power of the Attorney General is "[a]s hereinafter prescribed in this section. . . ." The Attorney General's authority to suspend deportation is provided, subsequently, in subsection 244(c)(1), rather than in subsection 244(a), and is only a power to defer deportation. *See McGrath* v. *Kristensen*, 340 U.S. 162, 168 (1950) (referring to antecedent of section 244). The mechanism to "cancel deportation proceedings" is contained in subsection 244(c)(2), the provision which the court invalidated, and the mechanism for recording an alien's lawful admission for permanent residence,

in subsection 244(d), operates only "[u]pon the cancellation of deportation" under subsection 244(c)(2).[39] In sum, the subsections of 244 are "so interwoven," *Electric Bond & Share Co.* v. *SEC*, *supra*, 303 U.S. at 434, that without subsection 244(c)(2) there is no authority to cancel a suspended deportation or to grant permanent residence.[40]

The history of section 244, described at pages 9–17 *supra*, confirms that Congress considered legislative review to be indispensable to the grant of permanent residence to deportable aliens. Between 1934 and 1938, three Congresses repeatedly rejected proposals to delegate to the executive branch authority to grant final relief from deportation.[41] In the 76th Congress, the House proposed initially to grant to the executive only the power to suspend deportations temporarily and to recommend to Congress legislation to cancel the deportations. The Secretary of Labor then renewed her request for authority to cancel deportations. The final bill maintained the narrow role for the executive, as proposed by the House, but changed the burden on the Attorney General and the alien from

[39] Speaking of the antecedent of 244(c)(3), this Court recognized that "deportation finally cancels only if Congress affirmatively approves the suspension. . . ." *Jay* v. *Boyd*, 351 U.S. 345, 351 (1956).

[40] The court of appeals relied on the standard severability clause, INA, § 406. This clause may well render section 244 severable from other sections of the comprehensive INA, but it hardly provides guidance whether Congress intended particular subsections of section 244 to be independent of other subsections. Moreover, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968).

[41] *Cf. New York Times Co.* v. *United States*, 403 U.S. 713, 746–47 (1971) (Marshall, J., concurring) (significance of congressional rejection of legislation to prohibit disclosure of classified information); *Afroyim* v. *Rusk*, 387 U.S. 253, 257–61, 263–66 (1967) (same for rejection of proposed expatriation authority); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 586 (1952) (same for rejection of proposed statutory authorization for plant seizures).

The sole reference by the court of appeals to the history of section 244 is to remarks of Representative Dies in 1937, three years before the 1940 Act (J.S. 15a). Representative Dies spoke in favor of a bill to give authority to the Attorney General, without legislative review, to grant permanent residence to a limited number of deportable aliens over a four-year period. 81 Cong. Rec. 5542 (1937). The bill passed only the House.

that of persuading the Congress to adopt legislation to implement a recommendation, to that of dissuading it from disapproving one. This arrangement enhanced the force of the Attorney General's recommendations, but it preserved the final authority of the Congress to decide whether permanent residence should be granted to deportable aliens.

Since 1940, the Congress has repeatedly reaffirmed that congressional review is indispensable to the grant of permanent residence to deportable aliens. Congress rejected executive requests for authority to cancel deportations in 1947, 1956, and 1957. *See* pages 13, 15–16 *supra*. It renewed its judgment about the importance of congressional review in the 1962 amendments to section 244. *See* page 17 *supra*.[42]

Now, after more than forty years of legislative consideration of section 244 and its predecessors, the executive is asking the Court to rewrite the legislation and to give to the executive the power which Congress has repeatedly refused to grant. To sever section 244(c)(2) despite this history would not only disrupt one delicate accommodation, but call into question dozens of similar ones. *See* Addendum 1 to brief, *infra*. As one commentator recently observed, often "the legislative veto has been the key to getting the very delegation of authority the executive wants." [43] In its requests to Congress for delegations of authority, the executive has known, as Attorney General

[42] Section 246 of the INA, 8 U.S.C. 1256, which governs rescission of permanent residence on the basis of new evidence, further demonstrates that congressional review is essential to the grant of permanent residence under section 244. The Attorney General has no authority to rescind permanent residence granted under section 244; that may occur only if the Congress passes a concurrent resolution withdrawing suspension of deportation. In contrast, the Attorney General may rescind the permanent residence of aliens whose status he had adjusted under section 245. The House Judiciary Committee explained: "Where adjustment was granted through congressional action, rescission would require such action, but where adjustment was obtained administratively, rescission would take effect through administrative action." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 63 (1952). The drafters of the INA plainly thought that permanent residence under section 244 was "granted through congressional action," rather than through action of the Attorney General.

[43] J. Sundquist, The Decline and Resurgence of Congress 356 (1981).

William Mitchell advised President Hoover, that provisions for congressional review would be inextricable from the delegated authority to which they are tied, and "must stand or fall together." 37 Op. Att'y Gen. 56, 66 (1933). The Fourth Circuit recognized this when it refused to separate a provision for congressional review from a government salary act, stating: "When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." [44]

The inseverability of section 244 may mean that no one has standing to litigate its constitutionality, for there is no relief which can be provided.[45] This was the common sense view of the INS special inquiry officer, who asked: "If [section 244(c)(2)] is unconstitutional where would that leave the respondent? . . . It would seem to me that the whole suspension procedure is a package deal and if the congressional review aspect is found unconstitutional it would follow that the whole section would become inoperative" (J.A. 49–50). Consequently, the question of appropriate procedures for relief from deportation remains in the political process. As the Court observed in *United States* v. *Richardson*, 418 U.S. 166, 179 (1974): "In a very real sense, the absence of any particular individual or class to liti-

[44] *McCorkle* v. *United States*, *supra*, 559 F.2d at 1261. *Cf. Arnett* v. *Kennedy*, 416 U.S. 134, 153–54 (1974) (opinion of Rehnquist, J.) (declining to sever "grant of a substantive right . . . inextricably intertwined with the limitations on the procedures which are to be employed in determining that right").

[45] Because the subsections of 244 may not be severed, section 244 as a whole would be invalid if subsection 244(c)(2) is found to be unconstitutional. The unfortunate but unavoidable consequence would be that the entire statutory authority for relief from deportation would be abrogated, to the injury of the many thousands of aliens who would have benefited from it in the future. However, since there is no one who can benefit from the invalidation of the statute as a whole, there is no one with standing to challenge the statute in its entirety. Of course, the INS cannot challenge the constitutionality of the statute in the absence of an individual litigant with a stake in the outcome of the case. *See Clark* v. *Valeo*, *supra*, 559 F.2d at 654 (Tamm, J., concurring).

gate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." [46]

V

SECTION 244(C)(2) IS CONSTITUTIONAL

On only two occasions has this Court found that an act of Congress infringed upon executive power. In both cases, the infringement violated a specific clause of the Constitution, namely, the Appointments Clause, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Myers* v. *United States*, 272 U.S. 52 (1926).[47] Only once has this Court even considered a claim that an act of Congress infringed upon executive power without also violating a specific clause of the Constitution. *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). There, in reviewing a statute which governed control over all the papers of a President, the Court stated that "the proper inquiry focuses on the extent to which [the act] prevents the Executive Branch from accomplishing its constitutionally assigned functions," and, if it does, "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.* at 443.

Section 244 passes this test. It augments, and in no manner infringes upon, executive power. Before 1940, private legislation was the exclusive means by which the political branches could agree that the rigorous requirements of the immigration laws should be waived for individual aliens. Acknowledging

[46] Congress has continued to give attention to the question of procedures for suspension of deportation in recent years. In 1980, the Senate and House Judiciary Committees reported bills to eliminate the congressional review provisions of section 244. *See* S. Rep. No. 859, 96th Cong., 2d Sess. 15 (1980); H.R. Rep. No. 1301, 96th Cong., 2d Sess. 32 (1980). The repeal provision was deleted from the the House bill and was not voted upon in the Senate. *See* 126 Cong. Rec. H11424 (daily ed. Dec. 1, 1980) (remarks of Rep. Holtzman).

[47] The court of appeals acknowledged: "[N]o circuit or Supreme Court authority we have found holds that the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the powers upon another branch with great specificity" (J.S. 25a (footnote omitted)).

that it lacked power to cancel deportations [48] and emphasizing the cumbersomeness of private bills, the executive requested an alternative mechanism to waive deportability. The supplementary procedure for canceling deportations and granting permanent residence that was eventually enacted, section 244, grants to the executive the important but limited role of suspending deportations and reporting to the Congress.

In enacting section 244, Congress delegated new authority to the executive which benefited aliens. First, the statute removes from aliens the burden of finding sponsors for private legislation by shifting to the executive the responsibility to initiate congressional consideration of relief. *See* 84 Cong. Rec. 10455 (1939) (remarks of Rep. Hobbs). Second, it requires one of the Houses of Congress, if it wishes to reject the Attorney General's recommendation, to act by resolution within a limited period of time. The nature of the Attorney General's role as recommendatory is not altered because section 244 provides for congressional action through disapproval rather than by ratification. Rather, section 244 enhances the participation of the executive by conditioning the power of the Congress to reject the Attorney General's recommendation upon its ability to pass a resolution of disapproval in one House within a limited period of time. The procedure is carefully tailored to prevent disruption to the executive branch. The restriction on congressional review through statutorily fixed time limits eliminates the potential for protracted consideration and prolonged irresolution that Jefferson viewed as "the greatest cause of evil" requiring separated powers (J.S. 32a–33a (quoting Jefferson)). Congress can hardly be accused of infringing on the authority of the executive by making the executive an important participant in the process of granting relief.

Congressional review does not undermine, as the court of appeals thought, "the weight and dignity that necessarily attends deliberative decisions by one of the highest officers in the Executive branch" (J.S. 53a). Under section 244, the Congress

[48] "Stays . . . which are in effect permanent are, despite the humane arguments in their favor, illegal." H.R. Doc. No. 392, 74th Cong., 2d Sess. 6 (1936) (report from Secretary Perkins).

does not review the decision of INS officers (to whom the Attorney General has delegated his authority) to grant a temporary suspension. Instead, the Congress exercises its own judgment whether permanent residence should be granted. As the court of appeals previously recognized: "[W]e do not construe the [House Judiciary] Committee's report [accompanying a resolution of disapproval under section 244] as an effort by the Committee to tell the Attorney General how he should exercise the discretion delegated to him by section 1254(a)(1). Rather, it is an explanation for the Committee's having exercised the discretion committed to it by section 1254(c). . . ." *Asimakopoulos* v. *INS*, 445 F.2d 1362, 1364–65 (9th Cir. 1971).

It is also significant that nothing in section 244 requires the executive to take any action, as in *Nixon* v. *Administrator of General Services, supra,* or *United States* v. *Nixon*, 418 U.S. 683 (1974). The initiating trigger of section 244 is purely discretionary; only if the Attorney General wishes to do so are deportations suspended temporarily and reports made to the Congress. If the Attorney General believes that the review mechanism in section 244 unconstitutionally infringes upon executive authority, he may refrain from submitting recommendations to the Congress for approval or rejection. President Johnson observed as he signed a bill containing a legislative review provision that "[B]y refusing to use the procedure, by noting my objections to it, and by seeking its repeal in the next session of Congress, it is possible to approve the remainder of the bill without yielding to encroachment." [49]

Nor does section 244 infringe on judicial power. The INA provides for judicial review of the refusal of the Attorney General to suspend a deportation and to transmit a recom-

[49] Pub. Papers 1083 (1965) (signing Omnibus Rivers and Harbors Act, Pub. L. No. 89–298, 79 Stat. 1073).

This Court has established the model for institutional self-defense; no branch need exercise a statutory power—*a fortiori* a purely discretionary power—if to do so would require it to submit its determinations to another branch for possible revision, in violation of the Constitution. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

mendation to Congress. *See INS* v. *Wang*, 450 U.S. 139 (1981) (per curiam). However, since the Attorney General lacks the power to grant permanent residence the courts have never reviewed whether an alien should have been granted that status, but only whether the Attorney General used proper procedures and standards in denying the alien the opportunity for congressional consideration. Once the matter has proceeded to congressional review, there is no judicial review of either a grant or a denial of permanent residence. Simply put, congressional review of instances in which the executive recommends suspension in no way affects judicial review of cases in which the executive declines to recommend suspension.[50] Section 244, therefore, cannot interfere with any function of the judiciary.

Section 244 is also justified by the need to promote objectives within the constitutional powers of the Congress, the second part of the Court's standard in *Nixon* v. *Administrator of General Services, supra.* The court of appeals acknowledged that "the practicality of alternatives to legislative disapproval in other situations raises difficult questions," specifically mentioning "the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority" (J.S. 55a (footnote omitted)). The court then ventured, "We do not think [Congress] would confess itself unable to formulate deportation rules or policies applicable to individual cases that are sufficiently clear for compliance by the Executive and for ascertainment by the Judiciary" (J.S. 62a).

" 'Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), *quoting Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). The Congress has legislated repeatedly and carefully in the exercise of this vast authority. It has established with precision categories to govern the admissibility, deportability, and eligibility for permanent residence of aliens. *See, e.g.*, INA,

[50] *See McGrath* v. *Kristensen, supra*, 340 U.S. at 168.

§§ 212, 241, 8 U.S.C. 1182, 1251. Congress has articulated "specific criteria" (J.S. 55a) with profuse and elaborate detail. Owing in large measure to the particularity of the immigration laws, the executive and the Congress perceived a need for a procedure to waive the mechanical operation of the rules of deportation for those few aliens who merit permanent residence in spite of, and for reasons unforeseeably deviating from, the reason for their deportability. Never in the prolonged period in which this problem has been debated has anyone suggested that the solution lay in more refined categorization.[51] In fact, President Truman's only objection to section 244 was to the restrictiveness of the eligibility standards in the 1952 Act, a condition which the Congress remedied in 1962. The Congress reasonably "promote[d] objectives within the constitutional authority of Congress," *Nixon* v. *Administrator of General Services, supra*, 433 U.S. at 443, by creating a flexible mechanism for relief, in which the Congress retains the ultimate responsibility of determining when to waive the mandatory provisions of the deportation laws.

The respondents also urged the court of appeals to find that section 244 violates the Presentation Clause and the principle of bicameralism. The court's lengthy opinion discusses bicameralism only at the end, after reiterating "that the essence of the violation here was the violation of the separation of powers rule" (J.S. 55a). We agree with the court's apparent view that the fundamental issue in this case, if the merits should be reached, is the separation of powers and not issues of legislative formalities. The approval or disapproval by the Congress or by one of its Houses under a statute providing for legislative

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[51] In 1979, the INS proposed regulations setting forth factors to be considered in the exercise of discretion under numerous provisions of the INA, not including section 244, to ensure "fair and uniform" adjudication "under appropriate discretionary criteria." 44 Fed. Reg. 36187 (1979). The proposed rule was canceled in 1981, because "[t]here is an inherent failure in any attempt to list those factors which should be considered in the exercise of discretion. It is impossible to list or foresee all of the adverse or favorable factors which may be present in a given set of circumstances." 46 Fed. Reg. 9119 (1981).

review is not an act of lawmaking.[52] The requirements of bicameralism and presentation are fully satisfied by the enactment of the underlying statute authorizing legislative review. *See Buckley* v. *Valeo*, *supra*, 424 U.S. at 284–86 (White, J., concurring and dissenting).[53]

The Department of Justice took this precise position when it advised the Senate on the constitutionality of congressional review in reorganization legislation in 1949: "In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the Reorganization Act." S. Rep. No. 232, 81st Cong., 1st Sess. 20 (1949) (Department of Justice memorandum). It also represents the position of the Attorney General more recently. In his opinion on the constitutionality of the legislative review provision of the most recent reorganization statute, 5 U.S.C. 906(a) (Supp. III 1979),

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[52] The implication of respondents' Presentation Clause claim is that *all* statutes which authorize disapproval by a simple or concurrent resolution are unconstitutional, because none requires that the resolution of disapproval be submitted to the President for approval. Approaching the issue as one of separation of powers allows the Court to examine the governmental powers involved in congressional review statutes, which include such constitutionally varied matters as war powers and agency rulemaking. The responsibility of the Congress under these statutes ranges from the ascertainment of facts in unique circumstances to the consideration of general standards. The court of appeals prudently recognized that other statutes and circumstances might present "considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device" (J.S. 55a).

[53] The Presentation Clause was adopted to ensure presentation of original bills, however styled, *see* 5 J. Elliot, Debates on the Adoption of the Federal Constitution 431 (1968 ed.), not to restrict the scope of properly enacted legislation.

Over a century ago, the Attorney General recognized that Congress could pass a statute authorizing actions by one House without depriving the President of his veto power because the President could veto the authorizing statute:

"Of course, no separate resolution of either House can coerce a Head of Department, unless in some particular in which a law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House." 6 Op. Att'y Gen. 680, 683 (1854).

Attorney General Bell stated that "the statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress." 43 Op. Att'y Gen. No. 10, at 2 (1977). The Attorney General stated that "if the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislative and the executive," then the statute is constitutional. *Id.* at 3. In the case of the reorganization statute, he concluded, the power of the President to refuse to submit a plan, combined with the power of either House of Congress to reject a submitted plan, suffices under the standard to make the statute constitutional. The Attorney General emphasized that his opinion "is limited to the narrow context of the reorganization statute," *id.* at 4, but the executive's justification of the constitutionality of the reorganization acts encompasses section 244, whose procedures and history parallel those very acts.

The Court has firmly rejected the "archaic view of the separation of powers as requiring three airtight departments of government." *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 443, *quoting Nixon* v. *Administrator of General Services*, 408 F. Supp. 321, 342 (D.D.C. 1976) (three-judge court). As Judge Leventhal stated in *Clark* v. *Valeo*, *supra*, 559 F.2d at 664 n.13, "The American Constitution accommodates hybrids that work." The Court need not, and should not, analyze this case on a hypothetical level, as the court of appeals did. Section 244 has benefited thousands of deportable aliens over the past forty years, during which the political branches have used it in harmony. It has served an entirely beneficial purpose, has injured no one, and should be sustained under "the test of 'common sense and the inherent necessities of the governmental co-ordination,'" *Atkins* v. *United States*, 556 F.2d 1028, 1071 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), *quoting*, *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928).

CONCLUSION

For the reasons stated in Part II, the judgment of the court of appeals should be vacated and the case remanded to the INS

to determine whether the constitutional question may be avoided through the grant of statutory relief. In the alternative, for the reasons stated in Parts III, IV, and V, the judgment of the court of appeals should be reversed.

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ADDENDA

ADDENDUM 1

STATUTES WITH PROVISIONS AUTHORIZING CONGESSIONAL REVIEW

This addendum represents an effort to identify and to describe briefly current statutory provisions for legislative review by one or both Houses of Congress. Statutory provisions for review by committees of the Congress and provisions which require legislation (i.e., passage of a joint resolution) are not included. The fifty-six statutes in the compilation (some of which contain more than one provision for legislative review) are divided into six broad categories: foreign affairs and national security, budget, international trade, energy, rulemaking and miscellaneous.

A.

FOREIGN AFFAIRS AND NATIONAL SECURITY

1. Act for International Development of 1961, Pub. L. No. 87–195, § 617, 75 Stat. 424, 444, 22 U.S.C. 2367 (Funds made available for foreign assistance under the Act may be terminated by concurrent resolution).

2. War Powers Resolution, Pub. L. No. 93–148, § 5, 87 Stat. 555, 556–557 (1973), 50 U.S.C. 1544 (Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.)

3. Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93–155, § 807, 87 Stat. 605, 615 (1973), 50 U.S.C. 1431 (National defense contracts obligating the United States for any amount in excess of $25,000,000 may be disapproved by resolution of either House).

4. Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93–365, § 709(c), 88 Stat. 399, 408 (1974), 50 U.S.C. app. 2403–1(c) (Applications for export of defense

goods, technology or techniques may be disapproved by concurrent resolution).

5. H.R.J. Res. 683, Pub. L. No. 94–110, § 1, 89 Stat. 572 (1975), 22 U.S.C. 2441 note (Assignment of civilian personnel to Sinai may be disapproved by concurrent resolution).

6. International Development and Food Assistance Act of 1975, Pub. L. No. 94–161, § 310, 89 Stat. 849, 860, 22 U.S.C. 2151n (Foreign assistance to countries not meeting human rights standards may be terminated by concurrent resolution).

7. International Security Assistance and Arms Control Act of 1976, Pub. L. No. 94–329, § 211, 90 Stat. 729, 743, 22 U.S.C. 2776(b) (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution).

8. National Emergencies Act, Pub. L. No. 94–412, § 202, 90 Stat. 1255 (1976), 50 U.S.C. 1622 (Presidentially declared national emergency may be terminated by concurrent resolution).

9. International Navigational Rules Act of 1977, Pub. L. No. 95–75, § 3(d), 91 Stat. 308, 33 U.S.C. § 1602(d) (Supp. III 1979) (Presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution).

10. International Security Assistance Act of 1977, Pub. L. No. 95–92, § 16, 91 Stat. 614, 622, 22 U.S.C. § 2753(d)(2) (Supp. III 1979) (President's proposed transfer of arms to a third country may be disapproved by concurrent resolution).

11. Act of December 8, 1977, Pub. L. No. 95–223, § 207 (2)(b), 91 Stat. 1625, 1628, 50 U.S.C. 1706(b) (Supp. III 1979) (Presidentially declared national emergency and exercise of conditional powers may be terminated by concurrent resolution).

12. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95–242, §§ 303, 304, 306, 307, 401, 92 Stat. 120, 130, 134, 137–38, 139, 144, 42 U.S.C. §§ 2160(f), 2155(b), 2157(b), 2153(d) (Supp. III 1979) (Cooperative agreements concerning storage and disposition of spent nuclear fuel, proposed export of nuclear facilities, materials or technology and proposed agreements for international cooperation in nuclear reactor development may be disapproved by concurrent resolution).

B.

BUDGET

13. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344, § 1013, 88 Stat. 297, 334–35, 31 U.S.C. 1403 (The proposed deferral of budget authority provided for a specific project or purpose may be disapproved by an impoundment resolution by either House).

C.

INTERNATIONAL TRADE

14. Trade Expansion Act of 1962, Pub. L. No. 87–794, § 351, 76 Stat. 872, 899, 19 U.S.C. 1981(a) (Tariff or duty recommended by Tariff Commission may be imposed by concurrent resolution of approval).

15. Trade Act of 1974, Pub. L. No. 93–618, §§ 203(c), 302 (b), 402(d), 407, 88 Stat. 1978, 2016, 2043, 2057–60, 2063–64, 19 U.S.C. 2253(c), 2412(b), 2432, 2434 (Proposed Presidential actions on import relief and actions concerning certain countries may be disapproved by concurrent resolution; various Presidential proposals for waiver extensions and for extension of nondiscriminatory treatment to products of foreign countries may be disapproved by simple (either House) or concurrent resolutions).

16. Export-Import Bank Amendments of 1974, Pub. L. No. 93–646, § 8, 88 Stat. 2333, 2336, 12 U.S.C. 635e (Presidentially proposed limitation for exports to USSR in excess of $300,000,000 must be approved by concurrent resolution).

D.

ENERGY

17. Act of November 16, 1973, Pub. L. No. 93–153, § 101, 87 Stat. 576, 582, 30 U.S.C. 185(u) (Continuation of oil exports being made pursuant to President's finding that such exports are in the national interest may be disapproved by concurrent resolution).

18. Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93–577, § 12, 88 Stat. 1878, 1892–1893, 42 U.S.C. 5911 (Rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by resolution of either House).

19. Energy Policy and Conservation Act, Pub. L. No. 94–163, § 551, 89 Stat. 871, 965 (1975), 42 U.S.C. 6421(c) (Certain Presidentially proposed "energy actions" involving fuel economy and pricing may be disapproved by resolution of either House).

20. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94–258, § 201, 90 Stat. 303, 309, 10 U.S.C. 7422(c)(2)(C) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House).

21. Energy Conservation and Production Act, Pub. L. No. 94–385, § 305, 90 Stat. 1125, 1148 (1976), 42 U.S.C. 6834 (Proposed sanctions involving federal assistance and the energy conservation performance standards for new buildings must be approved by resolution of both Houses).

22. Department of Energy Act of 1978—Civilian Applications, Pub. L. No. 95–238, §§ 107, 207(b), 92 Stat. 47, 55, 70, 22 U.S.C. 3224a, 42 U.S.C. 5919(m) (Supp. III 1979) (International agreements and expenditures by Secretary of Energy of appropriations for foreign spent nuclear fuel storage must be approved by concurrent resolution, if not consented to by legislation;) (plans for such use of appropriated funds may be disapproved by either House;) (financing in excess of $50,000,000 for demonstration facilities must be approved by resolution in both Houses).

23. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, §§ 205(a), 208, 92 Stat. 629, 641, 668, 43 U.S.C. §§ 1337(a), 1354(c) (Supp. III 1979) (Establishment by Secretary of Energy of oil and gas lease bidding system may be disapproved by resolution of either House;) (export of oil and gas may be disapproved by concurrent resolution).

24. Natural Gas Policy Act of 1978, Pub. L. No. 95–621, §§ 122(c)(1) and (2), 202(c), 206(d)(2), 507, 92 Stat. 3350,

3370, 3371, 3372, 3380, 3406, 15 U.S.C. 3332, 3342(c), 3346(d)(2), 3417 (Supp. III 1979) (Presidential reimposition of natural gas price controls may be disapproved by concurrent resolution;) (Congress may reimpose natural gas price controls by concurrent resolution;) (Federal Energy Regulatory Commission (FERC) amendment to pass through incremental costs of natural gas, and exemptions therefrom, may be disapproved by resolution of either House;) (procedure for congressional review established).

25. Export Administration Act of 1979, Pub. L. No. 96-72, § 7(d)(B), 7(g)(3), 93 Stat. 503, 518, 520, 50 U.S.C. app. 2406(d)(2)(B), 2406(g)(3) (Supp. III 1979) (President's proposal to domestically produce crude oil must be approved by concurrent resolution;) (action by Secretary of Commerce to prohibit or curtail export of agricultural commodities may be disapproved by concurrent resolution).

26. Energy Security Act, Pub. L. No. 96-294, §§ 104(b)(3), 104(e), 126(d)(2), 126(d)(3), 128, 129, 132(a)(3), 133(a)(3), 137(b)(5), 141(d), 179(a), 803, 94 Stat. 611, 618, 619, 620, 623-26, 628-29, 649, 650-52, 659, 660, 664, 666, 679, 776 (1980) (to be codified in 50 U.S.C. app. 2091-93, 2095, 2096, 2097, 42 U.S.C. 8722, 8724, 8725, 8732, 8733, 8737, 8741, 8779, 6240) (Loan guarantees by Departments of Defense, Energy and Commerce in excess of specified amounts may be disapproved by resolution of either House;) (President's proposal to provide loans or guarantees in excess of established amounts may be disapproved by resolution of either House;) (proposed award by President of individual contracts for purchase of more than 75,000 barrels per day of crude oil may be disapproved by resolution of either House;) (President's proposals to overcome energy shortage through synthetic fuels development, and individual contracts to purchase more than 75,000 barrels per day, including use of loans or guarantees, may be disapproved by resolution of either House;) (procedures for either House to disapprove proposals made under Act are established;) (request by Synthetic Fuels Corporation (SFC) for additional time to submit its comprehensive strategy may be disapproved by resolution of either House;) (proposed amendment to com-

prehensive strategy by SFC Board of Directors may be disapproved by concurrent resolution of either House or by failure of both Houses to pass concurrent resolution of approval;) (procedure for either House to disapprove certain proposed actions of SFC is established;) (procedure for both Houses to approve by concurrent resolution or either House to reject concurrent resolution for proposed amendments to comprehensive strategy of SFC is established;) (proposed loans and loan guarantees by SFC may be disapproved by resolution of either House;) (acquisition by SFC of a synthetic fuels project which is receiving financial assistance may be disapproved by resolution of either House;) (SFC contract renegotiations exceeding initial cost estimates by 175% may be disapproved by resolution of either House;) (proposed financial assistance to synthetic fuel projects in Western Hemisphere outside United States may be disapproved by resolution of either House;) (President's request to suspend provisions requiring build up of reserves and limiting sale or disposal of certain crude oil reserves must be approved by resolution of both Houses).

E.

RULEMAKING

27. Education Amendments of 1974, Pub. L. No. 93–380, § 509, 88 Stat. 484, 567, 20 U.S.C. 1232(d)(1) (Department of Education regulations may be disapproved by concurrent resolution).

28. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96–187, § 109, 93 Stat. 1339, 1364, 2 U.S.C. 438 (d)(2) (Supp. III 1979) (Proposed rules and regulations of the Federal Election Commission may be disapproved by resolution of either House).

29. Act of January 2, 1975, Pub. L. No. 93–595, § 2, 88 Stat. 1926, 1948, 28 U.S.C. 2076 (Proposed amendments by Supreme Court of Federal Rules of Evidence may be disapproved by resolution of either House).

30. Act of August 9, 1975, Pub. L. No. 94–88, § 208, 89 Stat. 433 ,436–37, 42 U.S.C. 602 note (Social Security standards pro-

posed by Secretary of Health and Human Services may be disapproved by either House).

31. Airline Deregulation Act of 1978, Pub. L. No. 95–504, § 43(f)(3), 92 Stat. 1705, 1752, 49 U.S.C. 1552(f) (Supp. III 1979) (Rules or regulations governing employee protection program may be disapproved by resolution of either House).

32. Education Amendments of 1978, Pub. L. No. 95–561, §§ 1138, 1212, 1409, 92 Stat. 2143, 2327, 2341, 2369, 25 U.S.C. 2018, 20 U.S.C. 1221–3(e) (Supp. III 1979) (Rules and regulations proposed under the Act may be disapproved by concurrent resolution).

33. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96–247, § 7(b)(1), 94 Stat. 349, 352–353 (1980) (to be codified in 42 U.S.C. 1997e) (Attorney General's proposed standards for resolution of grievances of adults confined in correctional facilities may be disapproved by resolution of either House).

34. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96–252, § 21(a), 94 Stat. 374, 393 (to be codified in 15 U.S.C. 57a–1) (Federal Trade Commission rules may be disapproved by concurrent resolution).

35. Department of Education Organization Act, Pub. L. No. 96–88, § 414(b), 93 Stat. 668, 685 (1979), 20 U.S.C. 3474 (Supp. III 1979) (Rules and regulations promulgated with respect to the various functions, programs and responsibilities transferred by this Act, may be disapproved by concurrent resolution).

36. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96–364, § 102, 94 Stat. 1208, 1213 (to be codified in 29 U.S.C. 1322a) (Schedules proposed by Pension Benefit Guaranty Corporation (PBGC) which requires an increase in premiums must be approved by concurrent resolution;) (revised premium schedules for voluntary supplemental coverage proposed by PBGC may be disapproved by concurrent resolution).

37. Farm Credit Act Amendments of 1980, Pub. L. No. 96–592, § 508, 94 Stat. 3437, 3450 (to be codified in 12 U.S.C. 2121) (Certain Farm Credit Administration regulations may be disapproved by concurrent resolution or delayed by resolution of either House).

38. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, § 305, 94 Stat. 2767, 2809 (to be codified in 42 U.S.C. 9655) (Environmental Protection Agency regulations concerning hazardous substances releases, liability and compensation may be disapproved by concurrent resolution or by the adoption by either House of a concurrent resolution which is not disapproved by the other House).

39. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96–515, § 501, 94 Stat. 2987, 3004 (to be codified in 16 U.S.C. 470w–6) (Regulation proposed by the Secretary of the Interior may be disapproved by concurrent resolution).

40. Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96–464, § 12, 94 Stat. 2060, 2067 (to be codified in 16 U.S.C. 1463a) (Rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution).

41. Act of December 17, 1980, Pub. L. No. 96–539, § 4, 94 Stat. 3194, 3195 (to be codified in 7 U.S.C. 136w) (Rules or regulations promulgated by the Administrator of the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act may be disapproved by concurrent resolution).

42. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, §§ 533(a)(2), 1107(d), 1142, 1183(a)(2), 1207, 95 Stat. 357, 453, 626, 654, 659, 695, 718–20 (to be codified in 20 U.S.C. 1089, 23 U.S.C. 402(j), 45 U.S.C. 761, 767, 564(c)(3), 15 U.S.C. 2083, 1276, 1204) (Secretary of Education's schedule of expected family contributions for Pell Grant recipients may be disapproved by resolution of either House;) (rules promulgated by Secretary of Transportation for programs to reduce accidents, injuries and deaths may be disapproved by resolution of either House;) (Secretary of Transportation's plan for the sale of government's common stock in rail system may be disapproved by concurrent resolution;) (Secretary of Transportation's approval of freight transfer agreements may be disapproved by resolution of either House;) (amendments to Amtrak's Route and Service Criteria may be disapproved by resolution of either House;) (Consumer Product Safety Commission regulations may be disapproved by concurrent resolution of

both Houses, or by concurrent resolution of disapproval by either House if such resolution is not disapproved by the other House).

F.

MISCELLANEOUS

43. Federal Civil Defense Act of 1950, Pub. L. No. 81–920, § 201, 64 Stat. 1245, 1248, 50 app. U.S.C. 2281(g) (Interstate civil defense compacts may be disapproved by concurrent resolution).

44. National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, § 302c, 72 Stat. 426, 433, 42 U.S.C. 2453 (President's transfer to National Air and Space Administration of functions of other departments and agencies may be disapproved by concurrent resolution).

45. Federal Pay Comparability Act of 1970, Pub. L. No. 91–656, § 3, 84 Stat. 1946, 1949, 5 U.S.C. 5305 (President's alternative pay plan may be disapproved by resolution of either House).

46. Act of October 19, 1973, Pub. L. No. 93–134, § 5, 87 Stat. 466, 468, 25 U.S.C. 1405 (Plan for use and distribution of funds paid in satisfaction of judgment of Indian Claims Commission or Court of Claims may be disapproved by resolution of either House).

47. Menominee Restoration Act, Pub. L. No. 93–197, § 6, 87 Stat. 770, 773 (1973), 25 U.S.C. 903d(b) (Plan by Secretary of the Interior for assumption of the assets the Menominee Indian corporation may be disapproved by resolution of either House).

48. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, §§ 303, 602(c)(1) and (2), 87 Stat. 774, 784, 814 (1973) (District of Columbia Charter amendments ratified by electors must be approved by concurrent resolution;) (acts of District of Columbia Council may be disapproved by concurrent resolution;) (acts of District of Columbia Council under certain titles of D.C. Code may be disapproved by resolution of either House).

49. Act of December 31, 1975, Pub. L. No. 94–200, § 102, 89 Stat. 1124, 12 U.S.C. 461 note (Federal Reserve System Board of Governors may not eliminate or reduce interest rate differentials between banks insured by Federal Deposit Insurance Corporation and associations insured by Federal Savings and Loan Insurance Corporations without concurrent resolution of approval).

50. Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. 94–502, § 408, 90 Stat. 2383, 2397–98, 38 U.S.C. 1621 note (President's recommendation for continued enrollment period in Armed Forces educational assistance program may be disapproved by resolution of either House).

51. Federal Land Policy and Management Act of 1976, Pub. L. No. 94–579, §§ 203(c), 204(c)(1), 90 Stat. 2743, 2750, 2752, 43 U.S.C. 1713(c), 1714 (Sale of public lands in excess of two thousand five hundred acres and withdrawal of public lands aggregating five thousand acres or more may be disapproved by concurrent resolution).

52. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95–19, § 401, 91 Stat. 39, 45, 2 U.S.C. 359 (Supp. III 1979) (President's recommendations regarding rates of salary payment may be disapproved by resolution of either House).

53. Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 415, 92 Stat. 1111, 1179, 5 U.S.C. 3131 note (Supp. III 1979) (Continuation of the Senior Executive Service may be disapproved by concurrent resolution).

54. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95–523, § 304(b), 92 Stat. 1887, 1906, 31 U.S.C. 1322 (Supp. III 1979) (Presidential timetable for reducing unemployment may be superseded by concurrent resolution).

55. District of Columbia Retirement Reform Act, Pub. L. No. 96–122, § 164, 93 Stat. 866, 891–92 (1979) (Required reports to Congress on the District of Columbia retirement program may be rejected by resolution of either House).

56. Act of August 29, 1980, Pub. L. No. 96–332, § 2, 94 Stat. 1057, 1058 (to be codified in 16 U.S.C. 1432) (Designation of marine sanctuary by the Secretary of Commerce may be disapproved by concurrent resolution).

ADDENDUM 2

CONGRESSIONAL DISAPPROVAL UNDER SECTION 244: 1953–1981 [a]

Congress	Years	Cases Considered	Cases Disapproved
83d	1953–54	[b]	0
84th	1955–56	696	5 [c]
85th	1957–58	[b]	0
86th	1959–60	[b]	0
87th	1961–62	[b]	0
88th	1963–64	[b]	0
89th	1965–66	1,865	111 [d]
90th	1967–68	433 [e]	58 [f]
91st	1969–70	265 [e]	24 [g]
92d	1971–72	436	7 [h]
93d	1973–74	208	6 [i]
94th	1975–76	577	16 [j]
95th	1977–78	270	1 [k]
96th	1979–80	419	1 [l]
97th	1981 [m]	532	0
Total		More than 5,701	229

[a] From 1940 to 1948, suspensions of deportation were subject to disapproval of Congress by concurrent resolution. As of April 21, 1947, 19,000 suspensions had been recommended to Congress, none of which had been rejected. *See Regulating Powers of Attorney General to Suspend Deportation of Aliens: Hearings, supra* note 14, at 33 (statement of Edward J. Shaughnessy (INS)). Between 1948 and 1952, there was no disapproval mechanism, as cancellation of deportation required a concurrent resolution of affirmative approval. The current procedure of section 244(c)(2), which authorizes rejection of the recommended grant of permanent residence by a resolution of disapproval in either House, dates from 1952. The difference between the number of cases considered and the number of cases disapproved represents the number of deportable aliens granted permanent residence.

[b] Not available. Data tend to be available only in years in which Congress has disapproved suspensions.

[c] S. Res. 124; S. Rep. No. 710; 101 Cong. Rec. 10682–83 (1955); S. Res. 296; S. Rep. No. 2349, 102 Cong. Rec. 11538 (1956).

[d] H.R. Res. 606; H.R. Rep. No. 1167; 111 Cong. Rec. 27420 (1965); H.R. Res. 1030; H.R. Rep. No. 2151; 112 Cong. Rec. 26088 (1966).

[e] This figure represents a minimum number of the cases considered. Data are partially unavailable.

[f] H.R. Res. 981; H.R. Rep. No. 1009; 113 Cong. Rec. 36535–37 (1967).

[g] H.R. Res. 422; H.R. Rep. No. 467; 115 Cong. Rec. 28802 (1969); H.R. Res. 540; H.R. Rep. No. 507; 115 Cong. Rec. 28802 (1969).

[h] S. Res. 194; S. Rep. No. 454; 117 Cong. Rec. 42281 (1971); H.R. Res. 1155; H.R. Rep. No. 1597; 118 Cong. Rec. 36419 (1972); S. Res. 366; S. Rep. No. 1171; 118 Cong. Rec. 31617 (1972).

[i] H.R. Res. 1518; 120 Cong. Rec. 41412 (1974).

[j] H.R. Res. 926; 121 Cong. Rec. 40800 (1975); H.R. Res. 1558; H.R. Rep. No. 1691; 122 Cong. Rec. 33017 (1976).

[k] H.R. Res. 796; H.R. Rep. No. 692; 123 Cong. Rec. 34987 (1977).

[l] H.R. Res. 817; H.R. Rep. No. 1518; 126 Cong. Rec. H11747 (daily ed. Dec. 3, 1980).

[m] Through October, 1981. There have been no disapprovals to date in the 97th Congress.

Table based upon data compiled by L. Fisher, Specialist in American National Government, Congressional Research Service, Library of Congress, Nov. 12, 1981. Statistics for "Cases Considered" are approximate.

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